

APPEAL NO. 171028
FILED JULY 6, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 22, 2017,¹ in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to a left shoulder labrum tear; (2) the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear; (3) the respondent (claimant) had not reached maximum medical improvement (MMI) on November 10, 2016; and (4) the impairment rating (IR) cannot be assigned at this time because the date of MMI has not been determined.

The appellant (carrier) appealed the hearing officer's determinations regarding extent of the injury to include a left shoulder labrum tear, MMI, and IR as being contrary to the preponderance of the evidence. The carrier argued further that the hearing officer erred in not adopting the certification of MMI/IR from the carrier's choice of physician, (Dr. E), because the parties stipulated that the claimant had reached statutory MMI on March 7, 2017, a date prior to the date of the CCH and because Dr. E had properly rated the compensable injury.

The claimant responded, urging affirmance.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the carrier accepted as components of the (date of injury), compensable injury a cervical strain, lumbar strain, chest wall contusion, and left shoulder strain; that the compensable injury does not extend to a left shoulder rotator cuff tear; that the date of statutory MMI is March 7, 2017; and that the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, (Dr. R), certified that the claimant was not at MMI on November 10, 2016.

¹ We note that in the Statement of the Case section of her Decision and Order the hearing officer mistakenly indicates the date of the CCH was March 22, 2015.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), extends to the left shoulder labrum tear is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

In her decision signed April 4, 2017, the hearing officer determined that the claimant had not reached MMI as of November 10, 2016, as certified by Dr. R in his alternative Reports of Medical Evaluation (DWC-69s) bearing such date. The hearing officer further determined that no IR could be assigned because the date of MMI had not been determined.

The issue for resolution certified at the benefit review conference and as stated in the hearing officer's decision, however, is:

2. Has [the] [c]laimant reached [MMI], and if so, on what date?

Based upon the parties' stipulation that the date of statutory MMI is March 7, 2017, it is undisputed that the claimant had, in fact, attained MMI prior to the March 22, 2017, date of the CCH. The hearing officer accordingly failed to resolve the disputed issue as certified and, instead, determined that the claimant had not reached MMI as of a date more than four months prior to the date of the CCH. Under the facts of this case, we find the hearing officer's failure to address the issue certified and agreed upon by the parties and to determine the claimant's date of MMI and IR, when it was undisputed that the claimant had reached statutory MMI prior to the date of the CCH, to be legal

error. We, therefore, reverse the hearing officer's determinations that the claimant had not reached MMI on November 10, 2016, and that an IR could not be assigned because the date of MMI had not been determined.

There are nine other certifications of MMI/IR in evidence. The first is from (Dr. S), a referral of the treating doctor. Dr. S examined the claimant on June 17, 2016, and in a DWC-69 certified that the claimant reached clinical MMI on June 7, 2016, with an eight percent IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). In an accompanying report, Dr. S noted diagnoses of sprain/strain of the neck, sprain/strain of the left shoulder with resulting tendinitis and a strain of the lumbar spine. As previously discussed, the hearing officer's determination that the compensable injury extends to a left shoulder labrum tear has been affirmed. Dr. S does not discuss the left shoulder labrum tear determined by the hearing officer to be compensable. Dr. S did not consider and rate the entire compensable injury and, consequently, his MMI/IR certification cannot be adopted. See Appeals Panel Decision (APD) 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005.

There are two MMI/IR certifications in evidence from Dr. E, the carrier's choice of required medical examination physician, who examined the claimant on February 9, 2017. In a DWC-69 dated February 9, 2017, Dr. E certified that the claimant reached MMI on May 25, 2015, with a zero percent IR. Dr. E made the same certification and assignment in a second DWC-69 dated March 15, 2017. In his reports, Dr. E indicated diagnoses of neck, shoulder and lumbar strains. Dr. E did not consider and rate the left shoulder labrum tear determined to be part of the compensable injury by the hearing officer and affirmed in this decision. Because Dr. E's MMI/IR certification does not rate the entire compensable injury, it cannot be adopted. APD 110267, *supra*, and APD 043168, *supra*.

The remaining MMI/IR certifications in evidence certify that the claimant has not reached MMI and cannot be adopted because the claimant's statutory MMI date of March 7, 2017, has passed.

Because there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury extends to a left shoulder labrum tear.

We reverse the hearing officer's determinations that the claimant had not reached MMI on November 10, 2016, and that the claimant's IR cannot be determined, and we remand the issues of MMI/IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. R is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. R is still qualified and available to be the designated doctor. If Dr. R is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The hearing officer is to advise the designated doctor that the (date of injury), compensable injury extends to cervical strain, lumbar strain, chest wall contusion, left shoulder strain and left shoulder labrum tear. The hearing officer is also to advise the designated doctor that the compensable injury does not extend to a left shoulder rotator cuff tear.

The hearing officer is to further advise the designated doctor that the statutory date of MMI as stipulated to by the parties is March 7, 2017, and that the certification of MMI can be no later than the March 7, 2017, statutory date of MMI. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

CONFIDENTIAL

Tex. Labor Code § 402.083

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge